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Federal Child Welfare Law and Policy: Understanding the Federal Law and Funding Process.

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Chapter 8 FEDERAL CHILD WELFARE LAW AND POLICY: UNDERSTANDING THE FEDERAL LAW AND FUNDING PROCESS

by Miriam Rollin,¹ Frank Vandervort,² and Ann M. Haralambie³

This chapter provides an overview of federal and uniform statutes that impact the practice of child welfare law.⁴

§ 8.1 Introduction to Federal Child Welfare Funding Legislation

Federal statutory child welfare policy is a patchwork of overlapping and confusing provisions. But viewed in a historical context, the federal statutory framework tells a story of a field of child protection that has evolved to address a successive series of challenges, as the perception of each of those challenges reached a “critical mass” over the last 30 years. In truth, some federal statutory changes in the child welfare area over the last 30 years have represented less of a linear progression and more of a pendulum swing back and forth from one extreme to another. The pendulum has swung from a tendency toward protecting children and removing them from their homes (and even terminating parental rights and moving children to adoption), to a tendency toward providing services to parents to prevent placements and return children home as soon as possible, and back again.

Concerned about the problems presented by child protection and foster care systems, in the mid-1970s the United States Congress began an effort to reform child welfare by enacting a series of incentive-based funding statutes. The general aim of these statutes is to encourage the states to take steps to reform their child welfare systems by funding the reforms Congress believes are

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⁴ The Federal Regulations issued by the Department of Health and Human Services or other federal agency responsible for the implementation of the various statutes discussed in this chapter are critically important to a thorough understanding of how these statutes are applied. *See generally*, THEODORE J. STEIN, CHILD WELFARE AND THE LAW (Revised Edition, 1998). The Children’s Bureau’s Web site contains a wealth of information: <http://www.acf.hhs.gov/programs/cb>.

important. The federal government's influence over child welfare practice has steadily grown over the past 30 years. While most of the federal statutes are concerned with financing systemic reform, in a few instances Congress explicitly indicated that federal law provides substantive law that supplants state law. In other circumstances, Congress has provided specific enforcement authority to individuals—*e.g.*, a child or a prospective foster parent—involved in the child welfare system.

In most instances, a state's compliance with the federal statutes is voluntary. That is, a state may choose to forego the federal financial assistance and be fully responsible for the costs of its own child welfare system. The funding incentives—in the hundreds of millions of dollars annually for larger states—are sufficient so that each state has determined it is in its interest to take the money. When a state avails itself of the federal financial support, it must comply with the requirements of the federal law.

One crucial element of the history of federal child welfare policy making is that the protection of children who are at risk of abuse or neglect, and of children who have been abused or neglected, has been overwhelmingly bipartisan. For example:

- The fully bipartisan co-sponsorship of the Child Abuse Prevention and Treatment Act in 1974.
- The 401-2 vote in the House of Representatives (and voice vote in the Senate) on the Adoption Assistance and Child Welfare Act of 1980.
- The bipartisan co-sponsorship of the Adoption and Safe Families Act of 1997 and its 416-5 vote in the House (and unanimous consent approval in the Senate).
- In the most recent vote on a child welfare policy bill, the 2003 vote on CAPTA reauthorization legislation (S. 342), the House of Representatives passed the Conference Report by a vote of 421-3, while the Senate adopted it by unanimous consent.

It will be to the benefit of these vulnerable children if Congress is able to continue to work together on both sides of the aisle as further child welfare policy improvements are made in the future.

In some ways, federal child welfare policy history is still very much a part of current child welfare policy—especially when one observes the link that is still maintained between Title IV-E foster care eligibility and the old AFDC income eligibility standards as applied to the child's family of origin, even though AFDC no longer exists.

Therefore, a timeline of major child welfare legislation—from the 1960s to the present—is listed in Section 8.2 below, to provide the historical context that is so essential to full comprehension of the labyrinth of current federal child welfare statutory law. Then, Section 8.3 of this chapter provides a snapshot of the current federal support designed to address child abuse and neglect, while

Section 8.4 provides information on key federal statutory requirements that may apply to various child welfare cases. Section 8.5 reviews other relevant federal and uniform statutes, and Section 8.6 reviews other current federal support that can assist abused and neglected children and their families. Finally, Section 8.7 demonstrates how a number of these federal statutory provisions apply to a particular child welfare case.

§ 8.2 Timeline of Major Federal Child Welfare Legislation⁵

1960s — Title IV-A, the Aid to Families with Dependent Children (AFDC) entitlement, is amended to allow use of funds for foster care expenses if the child comes from an AFDC-eligible family and a court determines it is in the child's best interest to be removed.

1974 — Child Abuse Prevention and Treatment Act is enacted.⁶ It is the only federal legislation exclusively dedicated to the prevention, identification, and treatment of child abuse and neglect. Funding for states is conditioned on their adoption of mandatory reporting laws, reporter immunity, confidentiality, and appointment of guardians ad litem for children.

1978 — Indian Child Welfare Act (ICWA) is adopted,⁷ establishing requirements for child welfare agencies when serving Native American children and families, including the requirement that tribes play a greater role in placement decisions regarding the children.

1980 — Enactment of the Adoption Assistance and Child Welfare Act of 1980⁸ establishes a new Title IV-E Foster Care and Adoption Assistance entitlement program, and requires that state agencies make "reasonable efforts" to prevent the removal of a child from his or her home and to reunify a child with parent(s), and specifies case review requirements for courts.

1981 — Title XX Social Services Block Grant to states is established⁹ to address a number of social services needs, including preventing child abuse.

1986 — Title IV-E Independent Living Program is established¹⁰ for foster care children ages 16 and over, to prepare them to live independently upon leaving foster care.

⁵ This Section 8.2 is adapted from a document entitled *TIMELINE OF MAJOR CHILD WELFARE LEGISLATION*, created by the Child Welfare League of America and posted on their Web site. Copyright Child Welfare League of America. All rights reserved. Available at: <http://www.cwla.org/advocacy/financingtimeline.htm> (last visited December 22, 2004).

⁶ Pub. L. No. 93-247.

⁷ Pub. L. No. 95-608.

⁸ Pub. L. No. 96-272.

⁹ Pub. L. No. 97-35.

¹⁰ Pub. L. No. 99-272.

1993 — Title IV-B is amended to create a new Family Preservation and Support Services program, as well as a new State Court Improvement program for courts handling foster care and adoption cases.¹¹

1994 — Multi-Ethnic Placement Act (MEPA) is enacted¹² to prohibit delay or denial of foster care or adoptive placements on the basis of race, color, or national origin of the child or prospective family.

1996 — Temporary Assistance for Needy Families (TANF) block grant is created,¹³ thus eliminating AFDC as an individual entitlement. While TANF replaces AFDC, the law requires states to continue to base Title IV-E Foster Care and Adoption Assistance eligibility on AFDC standards that were in place before the creation of TANF.

1997 — Adoption and Safe Families Act is enacted.¹⁴ It makes explicit the primacy of child safety in placement decisions, creates timelines for moving children to permanency, and provides adoption bonuses for states. The law also renames the Family Preservation and Support Services program to Promoting Safe and Stable Families and expands the use of funds to two additional categories of service: time-limited family reunification services and adoption promotion and support services.

1999 — Through the Foster Care Independence Act,¹⁵ the Independent Living program is expanded, strengthened, and renamed in honor of Senator John H. Chafee (R-RI).

2002 — Promoting Safe and Stable Families is reauthorized, together with Court Improvement. The law also amends the Chafee Independent Living program to provide funding for education and training vouchers for foster youth and creates new funding for mentoring of children of incarcerated parents.¹⁶

Note: For further information on the public laws listed above, visit the Library of Congress's legislative information Web site at <http://thomas.loc.gov>.

§ 8.3 Summary of Federal Funding Sources for Child Abuse and Neglect

§ 8.3.1 Foster Care Reimbursements to States

Title IV-E foster care reimbursements to states¹⁷ constitute by far the largest federal expenditure to address child abuse and neglect. These payments are matched with state dollars to pay the costs of each of the following:

¹¹ Pub. L. No. 103-66.

¹² Pub. L. No. 103-382; *see* 42 U.S.C. § 1996b.

¹³ Pub. L. No. 104-193.

¹⁴ Pub. L. No. 105-89.

¹⁵ Pub. L. No. 106-169.

¹⁶ Pub. L. No. 107-133.

¹⁷ Social Security Act, Title IV-E.

- “Foster care maintenance” (*i.e.*, housing, food, clothing, and supervision for a foster child).
- “Foster care administration” (*i.e.*, eligibility determinations, referrals to services, placing children, case plans, case reviews, case management and supervision, recruitment and licensing of foster homes, data collection and reporting, and other administrative functions).
- “Foster care training” (*i.e.*, training for foster care workers, as well as for foster parents).

Title IV-E foster care does not pay for services to prevent initial child abuse or neglect, to heal children who have been abused or neglected, or to help families care for abused or neglected children.

§ 8.3.2 Adoption Assistance Reimbursements to States

The second largest federal expenditure related to child abuse and neglect is Title IV-E Adoption Assistance.¹⁸ Adoption Assistance payments are also matched with state funds to support “maintenance” (subsidy payments to adoptive families of special needs children), “administration,” and “training,” as well as nonrecurring adoption expenses, but do not support prevention or treatment services for children, or services to help parents.

§ 8.3.3 Promoting Safe and Stable Families Program (PSSF)

The Promoting Safe and Stable Families Program (PSSF)¹⁹ is the largest dedicated source of federal child abuse/neglect prevention and intervention services (as opposed to placement) funding, and it includes funding that is specifically targeted toward prevention services and court improvement.

§ 8.3.4 Child Welfare Services Program

The Child Welfare Services Program²⁰ is the second largest dedicated source of federal child abuse/neglect services funds. It is very flexible; it has no funding targeted toward specific uses.

§ 8.3.5 Chafee Foster Care Independence Program

The Chafee Foster Care Independence Program²¹ is the only dedicated source of federal funding for the care of and services to youth aging out of foster care, to enhance their opportunities to become productive adults.

¹⁸ Social Security Act, Title IV-E.

¹⁹ Social Security Act, Title IV-B, Subpart 2.

²⁰ Social Security Act, Title IV-B, Subpart 1.

²¹ Social Security Act, Title IV-E.

§ 8.3.6 Child Abuse Prevention and Treatment Act Programs (CAPTA)

Child Abuse Prevention and Treatment Act Programs (CAPTA)²² includes three funding streams:

- Community-based funding for child abuse/neglect prevention (\$33 million in 2004).
- Child Abuse State Grants (\$22 million in 2004).
- Child Abuse Discretionary (research/demonstration) Grants (\$34 million in 2004).

§ 8.3.7 Other Smaller Federal Funding Sources

Other smaller federal funding sources to address child abuse and neglect include:

- The Children's Justice Act (CJA) provides grants to states to improve the investigation, prosecution, and judicial handling of cases of child abuse and neglect, particularly child sexual abuse and exploitation, in a manner that limits additional trauma to the child victim. In fiscal year 2003, \$17 million in CJA funds were available. Funding comes from the Crime Victims' Fund, which collects fines and fees charged to persons convicted of federal crimes.
- Victims of Child Abuse Act (VOCA) and related programs: for "children's advocacy centers" (multi-disciplinary interviewing centers) efforts (\$13 million in 2004); for Court Appointed Special Advocates (citizen volunteers trained to assist in individual cases) programs (\$12 million in 2004); for Judicial Training (\$2 million in 2004); and for televised testimony (\$1 million).
- Adoption Opportunities (\$27 million in 2004), Adoption Incentives (\$7 million in 2004), and Adoption Awareness (\$13 million in 2004).
- "Safe Haven" supervised visitation (\$15 million in 2004).
- Abandoned Infants Assistance (\$12 million in 2004).
- Child Welfare Training grants to higher education institutions (\$7 million in 2004).

²² 42 U.S.C. §§ 5101 through 5107.

§ 8.4 Key Federal Statutory Requirements

§ 8.4.1 The Child Abuse Prevention and Treatment Act

The Child Abuse Prevention and Treatment Act (CAPTA) was initially enacted in 1974, and it must be periodically reauthorized.²³ CAPTA was most recently reauthorized in 2003 as part of the Keeping Children and Families Safe Act, which was signed into law by President Bush in June of that year.²⁴ In general, CAPTA provides federal funding to support states' efforts aimed at preventing child maltreatment and responding to reports of child abuse and neglect.

CAPTA permits the Secretary of the Department of Health and Human Services (DHHS) to appoint an advisory board on child abuse and neglect, the purpose of which is to make recommendations to the Secretary of DHHS and to the relevant congressional committees regarding issues involving child maltreatment.²⁵ CAPTA also establishes the National Clearinghouse for Information Relating to Child Abuse (Clearinghouse).²⁶ The Clearinghouse gathers, analyzes, and disseminates data regarding child abuse and neglect. The Secretary of DHHS is charged with carrying out a program of research regarding child abuse and neglect, which may include—among other areas of consideration—“appropriate, effective and culturally sensitive investigative, administrative, and judicial systems, including multidisciplinary, coordinated decision-making procedures with respect to cases of child abuse”²⁷ as well as information on the national incidences of child abuse and neglect.²⁸

If a state wishes to avail itself of the money available through CAPTA, the state must apply to the DHHS and its application must address each of the areas of concern as established in the statute.²⁹ In essence, the state's application must establish a comprehensive program for: (1) mandated reporting of suspected child maltreatment; (2) responding to those reports with assessment methods that will separate valid reports from those that do not present sufficient evidence to be deemed valid; and (3) taking action appropriate to the level of risk of harm to the children involved.³⁰

Several provisions of CAPTA are of particular interest to lawyers who practice child welfare law. First, if judicial proceedings are needed to ensure the protection of the child, CAPTA requires the appointment of a guardian ad litem

²³ Pub.L. No. 93-247; 42 U.S.C. § 5101. For a detailed consideration of the most recent version of CAPTA, see: http://www.acf.hhs.gov/programs/cb/laws/capta03/capta_manual.pdf.

²⁴ Pub. L. No. 108-36.

²⁵ 42 U.S.C. § 5102.

²⁶ 42 U.S.C. § 5104.

²⁷ 42 U.S.C. § 5105(a)(1)(C).

²⁸ 42 U.S.C. § 5105(a)(2).

²⁹ 42 U.S.C. § 5106a.

³⁰ *Id.*

“who may be an attorney” for the child.³¹ CAPTA provides money to states to train professionals involved in preventing and responding to child abuse and neglect.³² These training programs must include guardians ad litem who represent children and for “the training of personnel regarding the legal duties of such personnel and their responsibilities to protect the legal rights of children and families.”³³ It also provides funding for:

improving legal preparation and representation, including—

- (i) procedures for appealing and responding to appeals of substantiated reports of abuse or neglect; and
- (ii) provisions for the appointment of an individual to represent a child in judicial proceedings³⁴

CAPTA requires each state that wants to avail itself of the federal funds provided under the statute to reapply every five years and to submit a plan that complies with CAPTA’s various provisions. Part of that plan must be an assurance:

that in every case involving an abused or neglected child which results in a judicial proceeding, a guardian ad litem, who has received training appropriate to the role, and who may be an attorney or a court appointed special advocate who has received training appropriate to that role (or both), shall be appointed to represent the child in such proceedings—

- (I) to obtain first-hand, a clear understanding of the situation and the needs of the child; and
- (II) to make recommendations to the court concerning the best interests of the child.³⁵

The 2003 CAPTA amendments let the individual states determine whether court proceedings regarding the adjudication of abuse and neglect may be open to the public.³⁶

The CAPTA requires that the state’s plan “shall, to the maximum extent practicable, be coordinated with the State plan under part B of title IV of the Social Security Act [42 U.S.C. §§ 620 et seq.] relating to child welfare services and family preservation and family support services”³⁷ Thus, CAPTA, when applied in conjunction with Titles IV-B and IV-E, provides for a comprehensive federal funding scheme to respond to alleged child maltreatment.

³¹ 42 U.S.C. § 5106a(b)(2)(A)(xiii).

³² 42 U.S.C. § 5106(a)(1).

³³ 42 U.S.C. § 5106(a)(1)(F).

³⁴ 42 U.S.C. § 5106a(a)(2)(B).

³⁵ 42 U.S.C. § 5106a(b)(2)(A)(xiii).

³⁶ 42 U.S.C. § 5106a(b).

³⁷ 42 U.S.C. § 5106a(b)(2).

§ 8.4.2 Titles IV-B and IV-E of the Social Security Act

The purpose of Titles IV-B and IV-E is to establish a funding scheme whereby a state's child welfare agency may receive federal funds to support its child protection efforts if it develops a comprehensive plan, in conjunction with DHHS and which the Secretary of the DHHS approves, that addresses all aspects of child welfare practice from prevention to provision of alternative permanent plans for children who cannot be safely maintained or returned to their natural families.³⁸ It should be noted that most provisions of these statutory schemes are not intended to and do not establish substantive law that applies to individual cases.³⁹ Rather, failure to adequately implement the state's plan or failure to abide by a corrective action plan established to address failures to adequately comply with the plan may result in financial penalties being assessed against the state.⁴⁰ These financial penalties can be substantial. The loss of the federal dollars may result in a diminution in critically important programming for children and families at the state and local level, so it is important that the various provisions of Titles IV-B and IV-E be complied with.

The federal government's concern about foster care was prompted by a growing consensus that too many children were entering the nation's foster care system, that they remained in that system too long and that too little effort was being made either to reunite foster children with their families of origin or to free them for adoption.⁴¹ It was against this background that Congress acted.

³⁸ See 42 U.S.C. § 622 ("In order to be eligible for payment under this subpart, a State must have a plan for child welfare services which has been developed jointly by the Secretary and the State agency. . . ."); 42 U.S.C. § 670 ("The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans under this part.").

³⁹ The 1997 ASFA amendments to Title IV-E make it explicitly clear that state agencies and state courts retain the right to take whatever action in an individual case that is necessary to protect the well-being of the child(ren) involved in that particular case. See 42 U.S.C. § 678 and Rule of Construction following 42 U.S.C. § 675. See also, *Suter v. Artist M.*, 503 U.S. 347 (1992) (federal statutory requirement that agency make reasonable efforts does not confer right to reasonable efforts on individual children in the foster care system); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (citing federal child welfare legislation and *Artist M.* as an example of exercise of federal spending power that is not intended to confer individual rights); but see, *Jeanie B. v. Thompson*, 877 F. Supp. 1268 (E.D. Wis. 1995) (in a class action suit, the court denied a motion for summary judgment because the class of children stated a claim); *Brian A. v. Sunquist*, 149 F. Supp. 2d 941 (M.D. Tenn. 2000) (in class action suit brought by children in foster care, those children were the intended beneficiaries of various provisions of the act).

⁴⁰ See generally 42 U.S.C. § 674.

⁴¹ Two U.S. Supreme Court cases from that era illustrate a number of the problems presented by the foster care system. In *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977), the court considered the due process claims of foster parents and foster children to remain together as a family where children in the New York foster care system had been placed with their foster parents for a median length of four years. Similarly, in the seminal case of *Santosky v. Kramer*, 455 U.S. 745 (1982), which establishes the constitutionally minimum burden of proof for termination of parental rights, the children at issue in the case had been in the foster care system for some five years before the state sought to terminate the parental rights of Mr. and Mrs. Santosky.

Adoption Assistance and Child Welfare Act of 1980

Congress passed and President Jimmy Carter signed into law the Adoption Assistance and Child Welfare Act of 1980 (AACWA).⁴² The AACWA sought for the first time to establish a comprehensive federal scheme to reform the nation's foster care system. It did so by establishing a program of contingent funding for the states. If a state developed child welfare and foster care programming consistent with the federal government's view of how such programs should be structured, then the state would be eligible to receive federal assistance in funding those services. Typically, the funds provided by the federal government require a state match, which is sometimes 25 percent and sometimes 50 percent.⁴³

The federal government's reform efforts fell into three broad categories. First, Congress sought to stem the flow of children into the foster care system by requiring that states make "reasonable efforts" to maintain children in their families by providing services aimed at preventing the unnecessary removal of children from their parents.⁴⁴ Next, beginning in 1983, the AACWA required states to make "reasonable efforts" to reunify children with their parents for a time-limited period, originally requiring a move toward permanency after 18 months.⁴⁵ Finally, the federal government sought to encourage the adoption of children from the foster care system by providing adoption subsidies to meet the needs of those children for whom financial considerations (such as special medical conditions) created a barrier to adoption. Similarly, the law sought to provide financial incentives to encourage the adoption of children with other special needs, such as emotional disturbance or behavioral problems.

Congress acted again in 1997.⁴⁶ Concerned that its intent with regard to the handling of child welfare cases—and especially that its intentions regarding the application of the "reasonable efforts" and family preservation provisions of the

⁴² Pub. L. No. 96-272.

⁴³ See, e.g., 42 U.S.C. § 674 (detailing percentages of reimbursements from the federal government).

⁴⁴ Title IV-B, 42 U.S.C. §§ 620 through 629i, seeks to provide, among other things, funding for an array of preventive services and to require as a prerequisite to receiving that funding that states coordinate their various child well-being related efforts.

⁴⁵ The federal law does not define "reasonable efforts." For helpful guidance in understanding the reasonable efforts concept and its application in practice, see ABA CENTER ON CHILDREN AND THE LAW, MAKING SENSE OF THE ASFA REGULATIONS (2001); CECILIA FIERMONTE & JENNIFER RENNE, ABA CENTER ON CHILDREN AND THE LAW, MAKING IT PERMANENT: REASONABLE EFFORTS TO FINALIZE PERMANENCY PLANS FOR FOSTER CHILDREN (2002).

⁴⁶ Between 1980 and 1997, there were several additions and modifications to the federal law governing child welfare, but they were relatively modest in comparison to the sweeping changes wrought by the AACWA and the ASFA. See, e.g., the Safe and Stable Families Act of 1993 (reauthorized by the Promoting Safe and Stable Families Act of 2001), 42 U.S.C. §§ 629 through 629i. The Web site of the National Resource Center for Family-Centered Practice and Permanency Planning contains helpful information regarding family preservation and permanency planning efforts: <http://www.hunter.cuny.edu/socwork/nrcfcpp>.

AACWA—had been misunderstood and misapplied,⁴⁷ Congress passed the Adoption and Safe Families Act (ASFA), which was signed into law by President Clinton in November 1997.⁴⁸

ASFA maintained the basic formula established in the AACWA. First, it reaffirmed the federal government's commitment to family preservation as a means of reducing the number of children who are removed from their home and in need of foster care placement. Similarly, ASFA maintained the requirement that in most cases state child welfare agencies were required to make "reasonable efforts" to maintain familial integrity and substantially increased the funding available to states for family preservation services. However, in doing so, it specifically sought to make clear its intention that "in determining reasonable efforts to be made with respect to a child . . . the child's health and safety shall be the paramount concern."⁴⁹

Next, when a child's safety within his or her family cannot be ensured and court action is necessary, ASFA requires states to implement a differential response.⁵⁰ In cases of serious child abuse that result in criminal conviction or where a parent has previously experienced involuntary termination of parental rights, ASFA excuses the reasonable efforts requirement and requires, as a prerequisite to receiving federal funds, that the state child welfare agency immediately initiate or join an effort to terminate parental rights or otherwise place the child permanently.⁵¹

ASFA also invites, but does not require, each state to establish for itself a set of "aggravated circumstances" cases, which the state determines (by statute or policy) will render the parent ineligible for either family preservation or family reunification services.⁵² While the federal legislation lets each state determine

⁴⁷ See generally RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES* (1996) (arguing that family preservation had become the "central mission" of the child welfare system and that it placed children at an unacceptable and unnecessary risk of harm).

⁴⁸ Pub. L. No. 105-89.

⁴⁹ 42 U.S.C. § 671(a)(15).

⁵⁰ This term is borrowed from Professor Jane Waldfogel, who defines a "differential response" as one:

[I]n which CPS and its partners tailor their approach and services to fit each family's problems, needs, and resources. At the most general level, a differential response implies there are at least two pathways for families referred for abuse or neglect: a mandatory investigation for high-risk families, and an assessment- and service-oriented response for low-risk families. Within each pathway, the approach of the caseworkers and the services they recommend will be customized to fit the family's situation.

See Jane Waldfogel, *Rethinking the Paradigm for Child Protection*, 8 *THE FUTURE OF CHILDREN* (1998), available at http://www.futureofchildren.org/information2826/information_show.htm?doc_id=75380.

⁵¹ 42 U.S.C. § 671(a)(15)(D)(ii); see 45 C.F.R. § 1356.21(b)(3) (requiring that the parent be convicted on the relevant crime before the mandatory termination provision of ASFA is triggered).

⁵² 42 U.S.C. § 671(a)(15)(D)(i).

the specific types of cases that will fall within the “aggravated circumstances” designation, it suggests that appropriate cases may include situations where the parent has subjected the child to “abandonment, torture, chronic abuse and sexual abuse.”⁵³ Finally, ASFA permits the state child welfare agency to seek, and the court to grant, a request for immediate or early termination of parental rights in any case where the facts and circumstances of that particular child’s situation warrant such action.⁵⁴

Some states allow the child’s advocate to petition the court to terminate parental rights or to otherwise move to permanency at any time after the case is filed.⁵⁵ If your state permits such action, it is a good practice for the child’s advocate to consider in every case whether the facts of the case merit an effort to seek immediate or early termination or if continued efforts to reunify the family will best serve the child.

Unless the court has determined that no “reasonable efforts” are required and permits a party to immediately implement an alternative permanent plan, the state must make “reasonable efforts” to reunify the child with his or her parent. While the federal law requires reasonable efforts in most cases, it does not define the term. Defining what constitutes “reasonable efforts” in a way that is truly helpful and provides practitioners with the guidance they need has proven elusive. Missouri, for example, uses this definition:

“reasonable efforts” means the exercise of reasonable diligence and care . . . to utilize all available services related to meeting the needs of the juvenile and the family. In determining reasonable efforts to be made and in making such reasonable efforts, the child’s present and ongoing health and safety shall be the paramount consideration.⁵⁶

⁵³ *Id.* Note, again, that this list is merely suggestive and each state is free to determine for itself whether or not to include these or other groups of cases. For example, Michigan has adopted a definition of “aggravated circumstances” cases that includes child sexual abuse involving penetration or attempt to penetrate, but has not included sexual abuse that involves only fondling. See MICH. COMP. LAWS ANN. § 722.638 (requiring state child welfare agency to petition the court and to seek termination of parental rights at the initial dispositional hearing); MICH. COMP. LAWS ANN. § 712A.19b(3)(k) (establishing basis for termination of parental rights). For more information regarding aggravated circumstances provisions of state laws, visit the Web site of the National Clearinghouse on Child Abuse and Neglect Information: <http://nccanch.acf.hhs.gov>.

⁵⁴ See Rule of Construction following 42 U.S.C. § 675 (Pub. L. No. 105-89, § 103(d)). See generally *U.S. v. Welden*, 377 U.S. 95, fn 4 (1964); 42 U.S.C. § 678 (permitting state court to take any action necessary to protect the health and safety of a child in a particular case unless immediate permanency is required because the parent has murdered his or her child, committed manslaughter, aided or abetted murder or manslaughter, or has committed a felony assault that has resulted in serious bodily injury). See, e.g., 705 ILL. COMP. STAT. ANN. § 405/1-2(1)(c) (permitting immediate termination “in those extreme cases in which the parent’s incapacity to care for the child, combined with an extremely poor prognosis for treatment or rehabilitation, justifies expedited termination of parental rights.”).

⁵⁵ See, e.g., MICH. COMP. LAWS ANN. § 712A.19b(1).

⁵⁶ MO. ANN. STAT. § 211.183.

In order to operationalize the definition, some states have combined a definition of “reasonable efforts” with criteria to assist courts in determining whether the state agency has made reasonable efforts. Iowa provides an example of this approach:

“reasonable efforts” means the efforts made to preserve and unify a family prior to the out-of-home placement of a child in foster care or to eliminate the need for removal of the child or make it possible for the child to safely return to the family’s home. . . . Reasonable efforts may include intensive family preservation services or family-centered services, if the child’s safety in the home can be maintained during the time the services are provided. In determining whether reasonable efforts have been made, the court shall consider both of the following:

- (1) The type, duration, and intensity of services or support offered or provided to the child and the child’s family. If intensive family preservation services were not provided, the court record shall enumerate the reasons the services were not provided, including but not limited to whether the services were not available, not accepted by the child’s family, judged to be unable to protect the child and the child’s family during the time the services would have been provided, judged to be unlikely to be successful in resolving the problems which would lead to removal of the child, or other services were found more appropriate.
- (2) The relative risk to the child of remaining in the child’s home versus removal of the child.⁵⁷

Despite the definitional difficulties, when “reasonable efforts” must be made, the state’s child welfare agency must establish a “case plan.” The plan must include a description of the child’s placement; a schedule of services to be provided to the child, the child’s parents, and the foster parents to facilitate reunification; and other similar matters.⁵⁸ If the child is 16 years of age or older, the plan must include services aimed at helping the youth to prepare for independence.⁵⁹ If the permanency plan for the child is adoption or some other alternative permanent plan (*e.g.*, permanent guardianship), then the case plan must include a description of the “reasonable efforts” made to achieve that alternative goal.⁶⁰

⁵⁷ IOWA CODE § 232.102.

⁵⁸ See 42 U.S.C. § 675(1) (defining “case plan”).

⁵⁹ See the discussion of the Foster Care Independence/Chafee Act below. It should also be noted that some states have made these services available to youth younger than 16. You should consult your state law and policy to determine your state’s approach to this question.

⁶⁰ 42 U.S.C. § 675(1)(E).

In addition to the provisions that obviate the need to make “reasonable efforts,” ASFA made numerous procedural changes aimed at expediting children’s moves through the child welfare system. For example, the state’s plan for providing foster care must include a “case review system” that provides for periodic review of the case by a court or an administrative agency at least every six months, as well as a permanency planning hearing to be held at least once every 12 months for as long as the child remains in foster care.⁶¹ Subject to several specific exceptions, when a child has been in foster care for 15 of the most recent 22 months, the state agency must seek termination of parental rights.⁶² At least one state supreme court, however, has required more than merely the passage of time when considering termination based on this provision of ASFA.⁶³

ASFA continues the AACWA’s effort to get children out of the child welfare system and into permanent placements by permitting the use of concurrent planning, expanding the use of adoption assistance, and expanding the permanency options available to the states. First, ASFA gives states the option to begin using concurrent planning without suffering financial penalties.⁶⁴ Concurrent planning allows the state to simultaneously pursue efforts aimed at reunification as well as efforts to place the child in an alternative permanent setting if a family reunification cannot be achieved. Such a concurrent approach to permanency planning can shorten the child’s stay in temporary foster care.

Next, in addition to continuing the subsidies available to individual families to assist with the expenses of adoption, the ASFA provides each state a financial incentive to focus on efforts to move children who cannot be returned to their family of origin into adoptive homes. It does this by establishing a baseline of the number of adoptions and then paying the state a bonus for each adoption from foster care finalized in excess of that baseline.⁶⁵

Finally, ASFA expands the available permanency options.⁶⁶ For example, permanent guardianship was specifically recognized in ASFA as a form of permanency.⁶⁷ Illinois, for example, has established statutory scheme for subsidized

⁶¹ 42 U.S.C. § 675(5).

⁶² 42 U.S.C. § 675(5)(E).

⁶³ *In re H.G.*, 757 N.E.2d 864 (Ill. 2001) (termination based merely on child’s placement in foster care for 15 of most recent 22 months violated parent’s substantive due process right to custody of her or his child).

⁶⁴ 42 U.S.C. § 671(a)(15)(F); for a detailed discussion of concurrent planning, see LINDA KATZ ET AL., CONCURRENT PLANNING: FROM PERMANENCY PLANNING TO PERMANENCY ACTION (Lutheran Social Services of Washington and Idaho, 1994).

⁶⁵ 42 U.S.C. § 673b.

⁶⁶ See generally DONALD N. DUQUETTE & MARK HARDIN, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (Children’s Bureau, 1999) available at <http://www.acf.hhs.gov/programs/cb/publications/adopt02/02final.htm>.

⁶⁷ 42 U.S.C. § 675(7) (defining “legal guardianship” as a judicially created relationship that is intended to be permanent).

guardianship to be used when adoption is not a realistic option for a case, but it has been determined that the child cannot be returned home.⁶⁸ Some states have been granted Title IV-E waivers to provide financial subsidies to support permanent guardianships.

§ 8.4.3 The Indian Child Welfare Act

In 1978, the federal government responded to long-term advocacy by Native American groups and enacted the Indian Child Welfare Act (ICWA).⁶⁹ Unlike most of the federal legislation discussed in this chapter, the ICWA is substantive law. That is, if a state court determines that the ICWA applies to a case before it, the state court must apply the specific provisions of the ICWA to that case rather than applying the state's law.

The ICWA is an attempt to respond to the historical discrimination experienced by Native American families and tribes when their children were unnecessarily removed from their care in an effort to assimilate Native Americans into the dominant culture. The ICWA seeks to preserve the rights of both Indian families and Indian tribes to make decisions regarding their children.⁷⁰ Thus, tribal court orders regarding child custody are entitled to full faith and credit.⁷¹

Jurisdiction and Standing

An Indian tribe has exclusive jurisdiction over child protection proceedings that involve children who are domiciled on its reservation.⁷² Despite a tribe's exclusive jurisdiction over a child residing or domiciled on the reservation, a state court may enter emergency orders to protect an Indian child who is domiciled on a reservation but who is found off the reservation "in order to prevent imminent physical damage or harm to the child."⁷³ If a case involves an Indian child, the child's tribe has the right to request transfer of the case from the state court to the tribal court.⁷⁴ Such a request "shall be made promptly after receiving notice of the proceedings."⁷⁵ A state court must grant the tribe's request to

⁶⁸ 705 ILL. COMP. STAT. ANN. § 405/2-27.

⁶⁹ 25 U.S.C. §§ 1901 through 1963; see Bureau of Indian Affairs, Guidelines For State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584 (November 26, 1979), available at http://www.nicwa.org/policy/regulations/icwa/ICWA_guidelines.pdf. For an excellent detailed discussion of the ICWA's provisions and impact, see B.J. JONES, THE INDIAN CHILD WELFARE ACT HANDBOOK. The National Indian Child Welfare Association's Web site also contains a wealth of helpful information: <http://www.nicwa.org>.

⁷⁰ See 25 U.S.C. §§ 1901-1902.

⁷¹ 42 U.S.C. § 1911(d).

⁷² 25 U.S.C. § 1911(a).

⁷³ 25 U.S.C. § 1922.

⁷⁴ 25 U.S.C. § 1911(b).

⁷⁵ Bureau of Indian Affairs, Guidelines For State Courts; Indian Child Custody Proceedings, 44 FED. REG. 67584, Sec. C.1 (November 26, 1979), available at http://www.nicwa.org/policy/regulations/icwa/ICWA_guidelines.pdf.

transfer the case unless there is “good cause” to deny it or a parent objects to the transfer.⁷⁶

Even if the tribe declines to remove a case from the state child protective proceeding process, the tribe has standing to intervene in the state court proceeding at any point.⁷⁷

Application

The ICWA applies to any child protective proceeding in which the right to custody of an “Indian child” is at issue.⁷⁸ Additionally, ICWA applies to cases in which an Indian child’s parent wishes to voluntarily place a child in foster care or for adoption.⁷⁹ An “Indian child” is a child whose parent is a member of a federally recognized Indian tribe or band and who is also eligible for such membership.⁸⁰ Each Indian tribe has the exclusive right to determine its eligibility requirements. While some tribes have a blood quantum requirement for eligibility, this is not a universal measure of eligibility.

Notice

When a child welfare proceeding may involve an Indian child, the ICWA requires that notice be provided to the child’s parents or “Indian custodian” and to the child’s tribe.⁸¹ The ICWA provides for notice to be provided “where the court knows or has reason to know that an Indian child is involved.”⁸² Clearly, ICWA’s notice requirement is very broad, requiring that notice be provided when there is any hint of Native American heritage.⁸³ Providing notice to the child’s parents is routine for state courts. However, notice may be complicated in

⁷⁶ 42 U.S.C. § 1911(b). The federal statute does not define “good cause” to decline transfer. The Bureau of Indian Affairs Guidelines, however, establishes four bases on which a state court may decline to transfer a case to a tribal court. Bureau of Indian Affairs, Guidelines For State Courts; Indian Child Custody Proceedings, 44 FED. REG. 67584, Sec. C.3 (November 26, 1979), available at http://www.nicwa.org/policy/regulations/icwa/ICWA_guidelines.pdf.

⁷⁷ 25 U.S.C. § 1911(c).

⁷⁸ The ICWA defines “custody” to include only cases in involving child protection, guardianship and status offense cases. The ICWA does not apply in the divorce context or to delinquency cases.

⁷⁹ See 25 U.S.C. § 1913; *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30; 109 S. Ct. 1597; 104 L. Ed. 2d 29 (1989).

⁸⁰ 25 U.S.C. § 1912(a).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* See *In re I.E.M.*, 599 N.W. 2d 772 (Mich. 1999) (where mother mentioned at a preliminary hearing that there was some Native American heritage in her family, failure to provide notice pursuant to ICWA was error); *In re Colnar*, 757 P.2d 534 (Wash. App. 1988) (mother’s claim that child was Indian child sufficient to trigger notice requirement); *In re M.C.P.*, 571 A.2d 627 (1989) (notice requirement triggered when court had reason to believe child was Indian child); but see, *In re O.K.*, 106 Cal. App. 4th 152; 130 Cal. Rptr. 2d 276 (2003) (grandmother’s statement that child may qualify as Indian child not sufficient to trigger notice requirement).

an ICWA case because if the whereabouts of the child's parents are unknown, notice must be provided to the Secretary of the Interior.⁸⁴ Moreover, some courts struggle with the concept of a child's "Indian custodian" because such a relationship may be established by either tribal law or tribal custom.⁸⁵ Similarly, providing notice to the tribe can be complicated if membership is uncertain. If the child's tribe is known, then notice must be provided directly to the tribe.⁸⁶ If tribal affiliation is uncertain, then notice must be provided to the Secretary of the Interior.⁸⁷ In some instances, a parent may communicate an affiliation with an Indian Nation that has more than one federally recognized tribe or band; for example, a parent may say, "My grandfather was Cherokee." In such a case, it is best practice that notice be provided to each federally recognized Cherokee tribe or band as well as the Secretary of the Interior.⁸⁸ Pursuant to the ICWA, notice must be provided by registered mail, return receipt requested.⁸⁹

The notice provisions of the ICWA are critically important. Counsel should make every effort to carefully document efforts made to notify the parents, the Indian custodian, and the Secretary of the Interior. As a practical matter, counsel should file with the court copies of any notice sent. Similarly, copies of any responses received from tribes or the Secretary of the Interior should be filed with the court.

Higher Standards of Evidence

ICWA requires that state courts apply higher standards of evidence before removing an Indian child from his or her parent or Indian custodian and when seeking termination of parental rights. At any stage in a proceeding where the state standard and the federal standard differ, the court must apply the higher of the two standards.⁹⁰ When removal from parental custody is sought, the petitioner must demonstrate by clear and convincing evidence—supported by expert testimony—that "continued custody by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."⁹¹ A court may terminate the parental rights of an Indian child only upon a showing beyond a reasonable doubt (again supported by expert testimony) that custody of the child by the parent or Indian custodian "is likely to result in serious emotional or physical damage to the child."⁹²

⁸⁴ 25 U.S.C. § 1912(a).

⁸⁵ 25 U.S.C. § 1903(6).

⁸⁶ 25 U.S.C. § 1912(a).

⁸⁷ *Id.*

⁸⁸ *See, e.g., In re N.E.G.P.*, 626 N.W. 2d 921 (Mich. Ct. App. 2001).

⁸⁹ 25 U.S.C. § 1912(a).

⁹⁰ 25 U.S.C. § 1921.

⁹¹ 25 U.S.C. § 1912(e).

⁹² 25 U.S.C. § 1912(f).

Placement

When the facts of a case warrant the removal of an Indian child from his or her home, the ICWA establishes placement criteria that must be followed.⁹³ When placing an Indian child into foster care or for adoption, the child must be placed as follows:

- (1) with a member of the child's extended family;
- (2) if no placement with a family member is available then the child must be placed in a foster home licensed or approved by the Indian child's tribe (this may include placement in a non-Indian foster home);
- (3) if neither 1 or 2 are available, then the child is to be placed with an Indian foster family that is approved by a non-Indian licensing authority; or
- (4) finally, if none of these are available, the child may be placed in an institution approved by a tribe or operated by an Indian organization.

It should be noted that this placement criteria, which specifically considers a child's Native American heritage, is in direct contrast to the typical scheme for placement of children into foster care established by the MEPA-IEP.

Failure to Comply

While the ICWA applies to a relatively small number of child welfare proceedings, when it does apply it is critically important to strictly adhere to its provisions. The ICWA provides that any improper removal of a child from parental custody or termination of parental rights may be invalidated by a court of competent jurisdiction.⁹⁴ This point is illustrated by what happened in *Mississippi Band of Choctaw Indians v. Holyfield*,⁹⁵ where the U.S. Supreme Court invalidated a voluntary adoption of two Indian children three years after the adoption because the ICWA's requirement for tribal notification was not complied with. Such actions, obviously, can disrupt even long-term placements and can be damaging to children.

Inapplicable to Some Native American Children

It is possible that a child could have substantial Native American heritage (and, therefore, cultural needs that should be considered) even though he or she is not eligible for membership in a particular tribe. Indeed, it is possible for a child to be fully Native American but still not meet the eligibility requirements for membership in any single federally recognized tribe. For example, this author was recently involved in a case where the child was descended from Native

⁹³ 25 U.S.C. § 1915.

⁹⁴ 25 U.S.C. § 1914.

⁹⁵ See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989).

American heritage on both his maternal and paternal sides, but because of tribal blood quantum membership requirements the child was not eligible for membership in any single tribe. Such a child still has important cultural concerns that should be considered.⁹⁶ Similarly, the ICWA applies only to children who are members or eligible for membership in tribes or bands recognized by the United States government. It does not apply to a Native American child whose tribe has not been recognized nor does it apply to a child descended from a Canadian tribe.

§ 8.4.4 The Multi-Ethnic Placement Act

In 1994, Congress enacted the Multi-Ethnic Placement Act (MEPA), which it amended by passage of the Interethnic Adoption Provisions of the Small Business Job Protection Act in 1996 (IEP).⁹⁷ In general, the MEPA-IEP contains two broad goals. First, it seeks to eliminate the consideration of a person's race, color, or national origin with regard to licensing foster parents and making placement decisions regarding either the foster or adoptive placement of children.⁹⁸ Specifically, MEPA-IEP provides:

neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements may—

- (A) deny to any person the opportunity to become an adoptive or a foster parent, on the basis of race, color, or national origin of the person, or of the child involved; or
- (B) delay or deny the placement of a child for adoption or into foster care, on the basis of race, color, or national origin of the adoptive or foster parent, or the child, involved.

The second overarching goal of MEPA-IEP is to “provide for the diligent recruitment of potential foster and adoptive families that reflect the ethnic and racial diversity of children in the State for whom foster and adoptive homes are needed.”⁹⁹

Application

Despite the categorical language of the MEPA-IEP, the state may in narrow circumstances consider race, color, or national origin when making placement

⁹⁶ See Chapter 6, Cultural Context in Abuse and Neglect Practice: Tips for Attorneys .

⁹⁷ MEPA-IEP's various provisions are codified in large part within Titles IV-B and IV-E. See 42 U.S.C. § 622(b)(9); 42 U.S.C. § 671(a)(18); 42 U.S.C. § 674(d). For an excellent detailed discussion of the MEPA-IEP, see JOAN HEIFETZ HOLLINGER & THE ABA CENTER ON CHILDREN AND THE LAW, A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996 (American Bar Association 1998), available from the Children's Bureau's Web site at <http://www.acf.hhs.gov/programs/cb/publications/mepa94/index.htm>.

⁹⁸ 42 U.S.C. § 671(a)(18).

⁹⁹ 42 U.S.C. § 622(b)(8).

decisions.¹⁰⁰ When a child has a specific need relating to race, color, or national origin, this need should be carefully documented and may be considered.¹⁰¹ Professor Hollinger has observed that “agencies may not routinely assume that children have needs related to their race, color, or national origin. Nor may agencies routinely evaluate the ability of prospective foster and adoptive parents to meet such needs.”¹⁰² However, she goes on to point out that, “As amended by IEP, MEPA does not prohibit agencies from the nondiscriminatory consideration of a child’s cultural background and experience in making an individualized placement decision,” although consideration of race, color, or national origin “should not predominate” the placement decision.¹⁰³ So for example, if an older child expresses particular concern regarding a cross-racial placement or if a child speaks only Spanish, this fact may be taken into consideration when selecting a foster or adoptive home.

Strict scrutiny applies to any placement decision in which race, color, or national origin is considered.¹⁰⁴ Thus, agency personnel must seek the least restrictive and most narrowly tailored means of addressing the concern. In the earlier example, the use of counseling to allay the child’s concern about cross-cultural placement or providing English lessons to the child and/or Spanish lessons to the foster care provider should be considered before the placement is denied. Such consideration should never affect placement decisions regarding infants.¹⁰⁵ Moreover, it is the intent of the “diligent recruitment” provision of the statute to reduce the necessity of such considerations by diversifying the pool of foster and adoptive homes. To meet the goal of more diverse placement resources, MEPA-IEP has been interpreted as eliminating even race-neutral licensing criteria that have a disparate impact on licensing particular groups of applicants.¹⁰⁶ For example, a state cannot mandate home ownership as a prerequisite to licensing foster homes if doing so would disproportionately impact applicants of a particular racial group for a foster care license.

Enforcement

The MEPA-IEP contains two basic enforcement mechanisms. First, as with the other federal child welfare legislation, violation of MEPA-IEP may result in financial penalties. If the state agency violates this statute, then it will suffer a

¹⁰⁰ JOAN HEIFETZ HOLLINGER & THE ABA CENTER ON CHILDREN AND THE LAW, A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996, 22 (American Bar Association 1998), available from the Children’s Bureau’s Web site at <http://www.acf.hhs.gov/programs/cb/publications/mepa94/index.htm>.

¹⁰¹ *Id.* at 22-23.

¹⁰² *Id.* at 22.

¹⁰³ *Id.* at 22-23.

¹⁰⁴ *Id.* at 23.

¹⁰⁵ *Id.* at 25.

¹⁰⁶ *Id.* at 12, *citing* Policy Guidance, 60 FED. REG. 20272, 20275.

two percent reduction in the amount of federal funds it is eligible to receive in the period during which the first offense occurs. If a second violation is identified, the state agency will lose three percent of its federal funding for that period. For a third or subsequent violation, the state will lose five percent of its funding for that fiscal year.¹⁰⁷ Similarly, but more severe still, if a private agency (*e.g.*, a private foster care agency that contracts with the state to provide services) violates MEPA-IEP's provisions, it will be required to remit to the DHHS all the funds it received for the fiscal quarter.¹⁰⁸

In addition to the public enforcement mechanism just described, MEPA-IEP provides for private enforcement by any individual—child or prospective foster or adoptive parent—who has been aggrieved by a violation of the statute.¹⁰⁹ Such enforcement may be brought in the form of a lawsuit “seeking relief” in a federal district court. Such a suit must be filed within two years of the violation.¹¹⁰

MEPA-IEP specifically states that its enactment does not in any way affect the application of the Indian Child Welfare Act.¹¹¹

§ 8.4.5 Special Immigrant Juvenile Status

Many federal laws have specific provisions governing the law's application to noncitizens. For example, the law creating Temporary Assistance for Needy Families (TANF)¹¹² in 1996 made substantial eligibility changes for immigrants that affected not only TANF but also other federal benefits. Attorneys handling cases involving immigrants should research applicable statutes for provisions specific to immigrant populations. One immigration law provision, however, specifically relates to juvenile court proceedings (and young immigrants' ability to remain in the United States after leaving foster care) and is included below—a provision related to Special Immigrant Juvenile Status.¹¹³

An alien is eligible for classification as a special immigrant juvenile status of the Immigration Act if the alien meets all of the following criteria:

- Is under 21 years of age.
- Is unmarried.
- Has been declared dependent on a juvenile court located in the United States¹¹⁴ in accordance with state law governing such declarations of

¹⁰⁷ 42 U.S.C. § 674(d)(1).

¹⁰⁸ 42 U.S.C. § 674(d)(2).

¹⁰⁹ 42 U.S.C. § 674(3).

¹¹⁰ *Id.*

¹¹¹ 42 U.S.C. § 674(d)(4).

¹¹² See § 8.6.1, Temporary Assistance for Needy Families (TANF).

¹¹³ Immigration Act of 1990, Pub. L. No. 101-649, § 153; 8 U.S.C. § 1101(a)(27).

¹¹⁴ 8 U.S.C. § 1101(a)(27)(J)(i).

dependency, while the alien was in the United States and under the jurisdiction of the court.

- Has been deemed eligible by the juvenile court for long-term foster care due to abuse, neglect or abandonment.¹¹⁵
- Continues to be dependent on the juvenile court and eligible for long-term foster care, such declaration, dependency or eligibility not having been vacated, terminated, or otherwise ended.
- Has been the subject of judicial proceedings or administrative proceedings authorized or recognized by the juvenile court in which it has been determined that it would not be in the alien's best interest to be returned to the country of nationality or last habitual residence of the beneficiary or his or her parent or parents.¹¹⁶

Except that—

- (I) no juvenile court has jurisdiction to determine the custody status or placement of an alien in the actual or constructive custody of the Attorney General unless the Attorney General specifically consents to such jurisdiction; and
- (II) no natural parent or prior adoptive parent of any alien provided special immigrant status under this subparagraph shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act. . .¹¹⁷

§ 8.4.6 The Foster Care Independence Act (Chafee)

The Foster Care Independence Act (also known as “The Chafee Foster Care Independence Program” or “Chafee Act”) was signed into law in December 1999.¹¹⁸ The Chafee Act amends certain provisions of Title IV-E and the Medicaid program and is intended to assist older youth in the foster care system to transition out of foster care and into independence as young adults.¹¹⁹ The Congressional findings that support the Chafee Act reaffirm that state agencies have an obligation to make reasonable efforts to obtain adoptive homes for older foster children who are free for adoption, but also recognize that “some older children will continue to live in foster care.”¹²⁰ Congress also recognized a number of the challenges faced by young persons aging out of the foster care system. These include “high rates of homelessness, non-marital childbearing,

¹¹⁵ 8 U.S.C. § 1101(a)(27)(J)(i).

¹¹⁶ 8 U.S.C. § 1101(a)(27)(J)(ii).

¹¹⁷ 8 U.S.C. § 1101(a)(27)(J)(iii).

¹¹⁸ Pub. L. No. 106-169.

¹¹⁹ See 42 U.S.C. §§ 671, 677, 1396a.

¹²⁰ See Pub. L. No. 106-169, § 101.

poverty, delinquent or criminal behavior; they are also the target of crime and physical assaults.”¹²¹ The primary goal of the Chafee Act is to increase flexibility in the use of funds to develop programs to meet the needs of this subgroup of the foster care population.

In order to address these problems, and to prepare youth to transition into independence, the Chafee Act:

- Establishes an improved independent living program, known as the John H. Chafee Foster Care Independence Program.¹²²
- Allows states to provide Medicaid coverage to young adults between the ages of 18 and 21 who were in foster care on their eighteenth birthday.¹²³
- Increases the minimum amount of assets from \$1,000 to \$10,000 that a youth in foster care may have and still be eligible for foster care funded by Title IV-E.¹²⁴
- Requires states to ensure that foster parents are prepared, both initially and on a continuing basis, to care for children placed with them.¹²⁵
- Authorizes increased funds for adoption incentive payments to the states to assist in finding permanent placements for children in foster care.¹²⁶

States may apply for funding to support their youth initiatives and, when doing so, must submit a five-year plan for implementation.¹²⁷ In addition to meeting the technical requirements of the Chafee Act set out in 42 U.S.C. § 677, the state must provide a 20 percent match for the funds. When a state receives federal funds under the Chafee Act, the state has two years to spend the money on programming. Each state must ensure that each political subdivision within the state has access to these transitional services.

States receiving Chafee Act funds must establish an array of services aimed at meeting the needs of youth of various ages and at various stages of independence. States must establish objective eligibility standards for receipt of Chafee Act services. The state may use Chafee Act funds to assist young adults ages 18 to 21 who have or who will age out of foster care,¹²⁸ and may use as much as 30 percent of these funds to pay room and board for these youth.

¹²¹ Pub. L. No. 106-169, § 1. See generally MARTHA SHIRK & GARY STANGLER, ON THEIR OWN: WHAT HAPPENS TO KIDS WHEN THEY AGE OUT OF THE FOSTER CARE SYSTEM (2004). Helpful information about older children in foster care and issues relating to aging out is available from the Jim Casey Youth Opportunities Initiative Web site: <http://www.jimcaseyyouth.org>.

¹²² 42 U.S.C. § 677.

¹²³ 42 U.S.C. § 1396a.

¹²⁴ 42 U.S.C. § 672(a).

¹²⁵ 42 U.S.C. § 671(a)(24).

¹²⁶ 42 U.S.C. § 673b.

¹²⁷ 42 U.S.C. § 677(b).

¹²⁸ Some states permit youth to remain in foster care beyond their eighteenth birthday.

In addition to services directed at youth, the Chafee Act provides that some of the funds must be used to train foster parents, group home staff, and case-workers in addressing the needs of older children and youth. As with the other federal funding statutes, the Chafee Act contains penalty provisions if the state misuses the funds.

Each state should have in place a program to aide youth transitioning from foster care to independence. The reader should seek out his or her state's plan and become familiar with its specifics.

§ 8.5 Other Relevant Federal and Uniform Statutes

In addition to the various federal child welfare legislation just described, there are several other federal statutes that have an impact on the practice of child welfare law. This section provides an introduction to these statutes.

§ 8.5.1 The Uniform Child Custody Jurisdiction and Enforcement Act

The Uniform Child Custody and Jurisdiction and Enforcement Act (UCC-JEA) is an updated version of the Uniform Child Custody Jurisdiction Act (UCCJA). While not a federal law, every state has enacted some version of either the UCCJA or the UCCJEA. The UCCJA was enacted in 1968 and had as its intent the establishment of uniform rules regarding jurisdiction over child custody decisions.¹²⁹ In 1997, the UCCJA was updated to clarify questions raised by the enactment in 1980 of the Parental Kidnapping Prevention Act. These statutes become important when a parent with custody of a child takes the child from one state to another and becomes involved with the child protection system in the subsequent state. For example, imagine a case in which Mr. and Mrs. Smith are married in California. Mrs. Smith gives birth to Sally. When Sally is five years old, Mr. and Mrs. Smith divorce in California. Mrs. Smith, who is awarded primary custody of Sally, is allowed to move with Sally to New York. In New York, when Sally is seven years old, Mrs. Smith becomes involved with an abusive boyfriend, drugs, and the excessive use of alcohol, which causes Sally's mom to leave Sally alone for days at a time. When Sally tells a school teacher what is happening at her home, the school authorities report their concern to child protection authorities.

In general, the UCCJA and the UCCJEA establish a child's "home state" as the jurisdiction with authority to make determinations regarding custody of a child. In our case example, California is Sally's "home state." California had jurisdiction and properly resolved the custody dispute between Sally's parents. Under the UCCJA and the UCCJEA, California retains jurisdiction to make custody determinations regarding Sally. New York, however, has "emergency"

¹²⁹ See generally JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 426-435 (2001).

jurisdiction over Sally because her health and safety are impaired by her mother's inability to provide a fit home environment for Sally. Under the UCCJA or UCCJEA, New York has "emergency" jurisdiction to enter orders that are necessary to protect and provide for Sally.¹³⁰

§ 8.5.2 The Parental Kidnapping Prevention Act

Despite the efforts of the uniform law—then just the UCCJA—to resolve jurisdictional disputes, there continued to be struggles regarding which of two states' courts had jurisdiction over child custody actions. In 1980 Congress responded to these concerns by enacting the Parental Kidnapping Prevention Act (PKPA),¹³¹ which is intended to "specify which types of custody decrees must be afforded full faith and credit, as well as the circumstances that would allow states to modify an outstanding custody decree of another state."¹³² The PKPA establishes a federal standard for giving effect to child custody orders. If a child custody order has been issued by a court with proper jurisdiction under state law, the PKPA ensures that that order will be entitled to full faith and credit in another state.

Regarding child maltreatment, the PKPA provides that a state court has jurisdiction if state law grants that court jurisdiction over child maltreatment cases and "the child is physically present in such state and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse."¹³³

Returning briefly to our example involving Sally and her parents, while the California court's order would generally be entitled to full faith and credit under PKPA, the PKPA would permit the New York court to take steps to protect Sally from parental maltreatment. The California court, however, retains jurisdiction to modify its original custody order.¹³⁴

The PKPA contains no requirement that the New York court notify either Sally's father or the California court of its protective actions regarding Sally. The UCCJA and UCCJEA, however, contain mechanisms for the New York court to notify the father in California and for the New York court to communicate with the California court.¹³⁵

¹³⁰ For a more detailed discussion of the application of the UCCJA and the UCCJEA to interstate child protective proceedings, *see* § 11.4.5.

¹³¹ 28 U.S.C. § 1738A.

¹³² JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW n. 109 at 435 (2001).

¹³³ 28 U.S.C. § 1738A(c)(2)(C).

¹³⁴ 28 U.S.C. § 1738A(f).

¹³⁵ *See, e.g.*, Section 108 of the UCCJEA (notice to party outside of the state); Section 110 of the UCCJEA (communicate with court with prior jurisdiction).

When child welfare proceedings trigger concerns regarding these uniform jurisdictional acts or the PKPA, these issues must be carefully analyzed and the requirements of the relevant statutes adhered to.

§ 8.5.3 Accessing Substance Abuse Treatment Records

According to a report issued by the DHHS in 1999, “alcohol and other drug abuse is recognized as a major contributing factor to child neglect and abuse and as one of the key barriers to family reunification.”¹³⁶ While the numbers of families involved in the child welfare system that are impacted by substance abuse is unclear, estimates suggest that between one-third and two-thirds of the cases in the child welfare system are complicated by substance abuse. What is certainly clear is that a substantial number of families who come to the attention of child welfare authorities are so impacted.¹³⁷ Because of the high correlation between involvement in the child welfare system and substance abuse, obtaining records of a parent’s substance abuse treatment is an issue that child welfare attorneys must confront at some point.

The provision of substance abuse treatment is heavily subsidized, either directly through subsidies that support treatment programs or indirectly through publicly funded medical insurance, such as Medicaid, that pays for treatment for individuals in need of these services. Federal law provides a broad grant of confidentiality protection for records relating to “any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States.”¹³⁸ After establishing the confidentiality of these records, the statute provides a broad grant of authority to the Secretary of the DHHS to establish regulations implementing the statute.¹³⁹

The statute provides an exception for treatment providers to report suspected child abuse or neglect.¹⁴⁰ Once the report of suspected child maltreatment has been made, the federal regulations implementing the statute make clear that the substance abuse treatment program may not provide additional information, such as diagnosis or prognosis, without the consent of the person receiving the treatment or a court order.¹⁴¹

An individual who receives substance abuse treatment may consent to the release of his or her records. For a recipient’s consent to be valid, it must meet

¹³⁶ U.S. DEP’T OF HEALTH AND HUMAN SERVS., *BLENDING PERSPECTIVES AND BUILDING COMMON GROUND: A REPORT TO CONGRESS ON SUBSTANCE ABUSE AND CHILD PROTECTION 4* (1999), available on the Children’s Bureau’s Web site at <http://www.acf.hhs.gov/programs/cb>.

¹³⁷ *Id.*

¹³⁸ 42 U.S.C. § 290dd-2(a).

¹³⁹ *Id.*

¹⁴⁰ 42 U.S.C. § 290dd-2(e).

¹⁴¹ *See* 42 C.F.R. §§ 2.1 and 2.67.

numerous technical requirements.¹⁴² Regardless of whether an individual consents to the release of the substance abuse treatment records, a court of competent jurisdiction may order the records released.¹⁴³ However, a court may order the records released only after application by a party seeking the release and a showing of “good cause” for the release.¹⁴⁴ The statute provides that “[i]n assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services.”¹⁴⁵

A number of courts have considered the release of substance abuse treatment records in the child welfare context.¹⁴⁶

§ 8.5.4 Health Insurance Portability and Accountability Act of 1996 (HIPAA)

Congress, recognizing that the advances in electronic technology could erode the privacy of health information, incorporated into HIPAA¹⁴⁷ federal privacy protections for individually identifiable health information. Under the HIPAA Privacy Rule, a provider (or other “covered entity”) may not use or disclose protected health information except: (1) as the Privacy Rule permits or requires; or (2) as the individual who is the subject of the health information (or the individual’s personal representative) authorizes in writing. In a section entitled “Effect on State Law,” HIPAA establishes that its provisions override state law. The statute then goes on to delineate a number of exceptions to this general rule. One exception that is specifically addressed relates to child maltreatment. That provision provides: “Nothing in this part [42 USCS §§ 1320d et seq.] shall be construed to invalidate or limit the authority, power, or procedures established under any law providing for the reporting of . . . child abuse . . . or public health investigation or intervention.”¹⁴⁸ Thus, HIPAA should not prevent reports of suspected maltreatment as mandated by state law from being made nor prevent access to information necessary to respond to alleged child maltreatment.

¹⁴² 42 C.F.R. § 2.31.

¹⁴³ 42 U.S.C. § 290dd-2(b)(2)(c).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ See, e.g., *State v. Harger*, 804 S.W. 2d 35 (Mo. Ct. App. 1991); *In re Baby X*, 97 Mich. App. 111, 293 N.W. 2d 736 (1980) (public’s interest in protection of child out weighs parent’s interest in confidentiality of records); *In re B.S.*, 163 Vt. 445, 659 A.2d 1137 (1995) (family court erred in ordering the release of substance abuse treatment records).

¹⁴⁷ Pub. L. No. 104-191; 42 U.S.C. § 1320d.

¹⁴⁸ 42 U.S.C. § 1320d-7(b).

§ 8.5.5 Americans with Disabilities Act of 1990 (ADA)

The Americans with Disabilities Act of 1990 (ADA)¹⁴⁹ was enacted to eliminate discrimination against persons with mental or physical disabilities and to require public entities to make reasonable accommodation for disabled persons.¹⁵⁰ Most courts considering the issue have determined that the ADA neither provides a defense to nor creates special obligations in a dependency or parental rights termination proceeding because those proceedings are not a “service, program, or activity” within the meaning of the ADA.¹⁵¹

Broadly, the ADA requires covered entities to make “reasonable accommodations” to permit individuals with disabilities to participate in and derive the benefit of employment, public accommodations, and the like. The ADA applies to discrimination in employment, in public accommodations, and in programs and services provided by state and local governments.¹⁵² In general, there are two concerns for practitioners of child welfare law regarding the ADA. First, the ADA’s protective provisions apply to children and protect them from discrimination based on their disabilities. Thus, for example, a childcare center must make an individualized determination as to whether a particular child’s disability should be accommodated by the program.¹⁵³ Because the ADA protects children in a number of circumstances, children’s lawyers should become familiar with its provisions and use it when necessary to assure that clients’ needs are met.

The second reason for concern is the application of the ADA to efforts provided by state child welfare agencies to reunify families. State courts have split regarding whether the ADA applies to efforts made by state agencies to reunify children with their natural parents after a finding of child abuse and neglect. Some state courts have determined that the ADA does not apply to reunification efforts.¹⁵⁴ Other courts have held that the ADA does apply at least in some form to the provision of services to parents and children in an effort to reunify.¹⁵⁵ When courts have held that the ADA applies in the child welfare context, they have typically found that the “reasonable accommodation” requirements of the ADA are satisfied if the state has met its burden to make “reasonable efforts”

¹⁴⁹ Pub. L. No. 101-336; 42 U.S.C. §§ 12101 through 12213.

¹⁵⁰ 42 U.S.C. § 12101(b).

¹⁵¹ For example, see *In re B.S.*, 166 Vt. 345, 693 A.2d 716 (1997); *Adoption of Gregory*, 434 Mass. 117, 747 N.E.2d 120 (2001).

¹⁵² 42 U.S.C. §§ 12101 through 12213.

¹⁵³ See U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIV., COMMONLY ASKED QUESTIONS ABOUT CHILD CARE CENTERS AND THE AMERICANS WITH DISABILITIES ACT, available at <http://www.usdoj.gov/crt/ada/childq&a.htm>.

¹⁵⁴ See, e.g., *State v. Raymond C.* (In re Torrance P.), 187 Wis. 2d 10, 522 N.W.2d 243 (1994); *Stone v. Daviess County Div. of Children & Family Servs.*, 656 N.E.2d 824 (Ind. Ct. App. 1995); *In re Karrlo K.*, 40 Conn. App. 73, 668 A.2d 1353 (1996).

¹⁵⁵ See, e.g., *In re Terry*, 610 N.W.2d 563 (Mich. Ct. App. 2000).

as required by the federal child welfare funding legislation.¹⁵⁶ The ADA does not provide a defense to a termination of parental rights action.¹⁵⁷ However, disabled parents involved in child welfare proceedings have the right to reasonable access to the courts, including physical access to the courthouse and provision of court interpreters where necessary.

Counsel should be aware of the ADA's potential applicability to child protection proceedings and should carefully consider its provisions, as well as the relevant case law, in determining how to proceed.

§ 8.5.6 Individuals with Disabilities Education Act (IDEA)

The Individuals with Disabilities Education Act (IDEA)¹⁵⁸ provides funding to states to ensure that all children, regardless of disability, have the right to free, appropriate public education. Parents or "surrogate parents" (often the child's foster parent, CASA, or specially trained adult appointed by the court for children in care) are entitled to participate in meetings concerning the child's eligibility for and participation in special education programs.¹⁵⁹ If the child qualifies, the school must provide an Individualized Education Program (IEP), which must be reviewed periodically.¹⁶⁰ The parent or surrogate parent has a right to participate in the formulation of the IEP and may present independent expert or multidisciplinary evidence at the IEP meeting. The IEP must state specifically how the child's disability affects his or her educational performance and must include specific, measurable goals and objectives and the services to be provided to remedy or accommodate the child's deficiencies.¹⁶¹ There is an administrative review procedure, which includes a due process hearing and an administrative appeal, and, ultimately, provision for court review and attorney fees.

In general, the act favors mainstreaming children in their local schools and regular classrooms to the maximum extent that is appropriate, and requires that schools provide related services needed to enable that student to achieve educational goals. Where necessary, however, school districts can be required to pay even for residential private schools if the district cannot otherwise meet the child's educational needs.

Once approved, the IEP is implemented, and then it is revised, as needed, by the IEP team. The school is not permitted to change the child's placement,

¹⁵⁶ See, e.g., *In re C.M.*, 526 N.W.2d 562 (Iowa Ct. App. 1994); *J.T. v. Arkansas Dep't. of Human Servs.*, 329 Ark. 243, 947 S.W.2d 761 (1997); *Robinson v. Department of Social & Health Servs.*, (*In re A.J.R.*), 78 Wn. App. 222, 896 P.2d 1298 (1995); *In re Angel B.*, 659 A.2d 277 (Me. Sup. Ct. 1995).

¹⁵⁷ See *People v. T.B.*, 12 P.3d 1221 (Colo. App. 2000); *In re Terry*, 610 N.W.2d 563 (Mich. Ct. App. 2000).

¹⁵⁸ 20 U.S.C. §§ 1400 through 1487.

¹⁵⁹ 20 U.S.C. § 1415(b).

¹⁶⁰ 20 U.S.C. § 1401(14); 20 U.S.C. § 1414(d).

¹⁶¹ 20 U.S.C. § 1414(d)(1)(A)(i).

except for a limited time for specified reasons (*e.g.*, up to 45-day removal due to a student's possession of drugs or weapons), without an approved revision in the IEP, unless the behavior that led to the removal was unrelated to the disability; in that case, regular school disciplinary rules and procedures apply.

IDEA also provides special education programs for qualified preschool children, including services even to infants.

§ 8.5.7 Education for Homeless Children and Youths Act

The Education for Homeless Children and Youths Act¹⁶² provides that homeless children and youth be given a free and appropriate public education and that they be permitted to remain in their schools despite not having a residential address within the district. The Act also prohibits segregation of homeless children and youth in the school.¹⁶³ For purposes of the Act, the definition of "homeless children and youths" explicitly include those who "are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement" and "children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings."¹⁶⁴

Schools are not permitted to require proof of residency, provision of birth or medical or school records, or proof of guardianship in order to admit homeless youth to school.¹⁶⁵ Students must be given full access to school enrollment (including pre-school, school lunch and breakfast, after-school programs, etc.) pending the school obtaining any records.¹⁶⁶ To the extent feasible and unless that is contrary to the wishes of the child's parent or guardian, a homeless child is entitled to remain in his or her "school of origin," the school he or she attended when permanently housed or the one in which the child was last enrolled so long as the child remains homeless.¹⁶⁷ This provision would apply, for example, to a child who disrupts from a foster home while that child is in a shelter awaiting further placement. The student is entitled to receive transportation to and from school. Instead of attending the "school of origin," the custodial parent or guardian may elect to have the homeless child attend any public school that other children living in the same attendance area may attend.

¹⁶² 42 U.S.C. §§ 11431 through 11435.

¹⁶³ 42 U.S.C. § 11432(e)(3).

¹⁶⁴ 42 U.S.C. § 11434a(2)(B).

¹⁶⁵ *See* 42 U.S.C. § 11432(g)(1)(H).

¹⁶⁶ 42 U.S.C. § 11432(g)(3)(C)(i).

¹⁶⁷ 42 U.S.C. § 11432(g)(3)(A), 11432(g)(1)(J)(iii).

§ 8.5.8 Children's Health Act of 2000

The Children's Health Act of 2000¹⁶⁸ included new provisions regarding the rights of residents of federally assisted hospitals and other health care facilities to be free from physical or mental abuse, corporal punishment, and any restraints or involuntary seclusions imposed for purposes of discipline or convenience.¹⁶⁹ The Act also included new provisions regarding the rights of children and youth in federally assisted non-medical community-based facilities for children and youth, tightly circumscribing the use of physical restraints and seclusion.¹⁷⁰

§ 8.5.9 Family Education Rights and Privacy Act of 1974 (FERPA)

The Family Education Rights and Privacy Act of 1974 (FERPA)¹⁷¹ provides that federal education funding will be provided to state educational agencies only if they comply with certain privacy and access rights regarding educational records. Under the Act, absent a court order providing otherwise, parents have the right to inspect and review their minor children's education records and to challenge errors in the records.

However, information covered by FERPA is discoverable for child welfare legal cases. FERPA permits the release of education records pursuant to state law, including court orders and subpoenas. It provides, in part:

(b) Release of education records; parental consent requirement; exceptions; compliance with judicial orders and subpoenas. . . .

(1) No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records . . . of students without the written consent of their parents to any individual, agency, or organization, other than to the following—

* * *

(E) State and local officials or authorities to whom such information is specifically allowed to be reported or disclosed pursuant to State statute adopted—

* * *

(ii) after November 19, 1974, if—

* * *

(II) the officials and authorities to whom such information is disclosed certify in writing to the educational agency or institution that the informa-

¹⁶⁸ Pub. L. No. 106-310; 42 U.S.C. § 290jj.

¹⁶⁹ 42 U.S.C. § 290ii.

¹⁷⁰ 42 U.S.C. § 290jj.

¹⁷¹ Pub. L. No. 93-380; 20 U.S.C. § 1232g.

tion will not be disclosed to any other party except as provided under State law without the prior written consent of the parent or the student.¹⁷²

Moreover, FERPA requires that school reports be released pursuant to either a court's order or subpoena, although the parent and child must be notified that the order or subpoena has been issued.¹⁷³ Thus, FERPA provides no barrier to counsel obtaining access to a child's educational records, although it mandates, as a contingency to receiving federal funding, that certain procedures be followed.¹⁷⁴

§ 8.6 Current Federal Funding for Other Supports for Children and Families

There are a number of other federal programs that are not exclusively—or even primarily—designed to serve abused or neglected children and their families, but that may be available, at least in part, to do so. Some are federal programs through which qualifying individuals may request particular assistance from the local, state, or federal agency (*e.g.*, Temporary Assistance for Needy Families, Medicaid, and Food Stamps). Others are federal block grants to states for particular types of services; states establish services of the specified types, and families may request assistance from state or local agencies (*e.g.*, Social Services Block Grants and the Maternal and Child Health Block Grant). Some of these federal programs include at least some amount of direct funding for child welfare purposes (*e.g.*, TANF and SSBG); others are supports generally available to assist categories of children and families, with some children and families who are involved in the child welfare system included in those categories (*e.g.*, Food Stamps, Child Care, and Title I Education for the Disadvantaged). Some, such as Foster Care and Adoption Assistance, are open-ended entitlements, meaning that federal funding automatically expands or contracts each year to provide the defined benefit for all eligible persons (*e.g.*, Medicaid and Food Stamps); most programs are funded at a specified level, not directly dependent on the level of need (*e.g.*, TANF and SSBG).

The following are the significant federal programs that support assistance for qualifying individuals—and include substantial child welfare services funding.

¹⁷² 20 U.S.C. § 1232g(b)(1)(E).

¹⁷³ 20 U.S.C. § 1232g(b)(2)(B).

¹⁷⁴ See *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (addressing a case in which plaintiff asserted that FERPA granted a private cause of action for release of educational records pursuant to state law to a professional licensing board).

§ 8.6.1 Temporary Assistance for Needy Families (TANF)

Temporary Assistance for Needy Families (TANF)¹⁷⁵ is a block grant to states created in 1996 as the successor to the open-ended entitlement program called Aid to Families with Dependent Children (AFDC). Funded at \$16.5 billion in Fiscal Year 2004, TANF funds time-limited (up to 5 years) financial assistance¹⁷⁶ to more than 2 million low-income families with children. Assistance is contingent on participants meeting work-hour requirements, and TANF also provides some work supports to participants (*e.g.*, training, child care, transportation). Most families who are TANF beneficiaries consist of children residing with their parents, but more than 12 percent of families who are TANF beneficiaries are children residing with grandparents or other non-parent relatives,¹⁷⁷ some of whom are providing care for the children after their removal from parents' care because of child abuse or neglect. In fact, TANF is a significant source of funding for child welfare services; according to the Urban Institute,¹⁷⁸ more than \$1.7 billion in TANF funds are used for child welfare services, including out-of-home placements (*e.g.*, the kinship care situations described above), adoption, and other services. In addition, a portion (up to 10 percent) of TANF funds may be transferred by states to the Social Services Block Grant (Title XX), which also funds many child welfare services.

§ 8.6.2 Medicaid

Medicaid¹⁷⁹ was enacted in 1965, in the same legislation¹⁸⁰ that created the Medicare program, which ensures health care for senior citizens. Medicaid is an entitlement program targeted at low-income individuals, although income eligibility levels, services covered, and reimbursements to providers vary somewhat from state to state. In fiscal year 2004, federal Medicaid costs were over \$180 billion. Over half of the more than 44 million people enrolled in Medicaid are under the age of 19 (including over 760,000 children in foster care), although only 16 percent of federal Medicaid expenditures are for children (those in foster care and other children) due to their far lower costs of care compared to costs for senior citizens and the disabled.

¹⁷⁵ Pub. L. No. 104-193; Social Security Act, Title IV-A; 42 U.S.C. §§ 601 through 619.

¹⁷⁶ In 2002, average monthly benefits ranged from \$154 per month in South Carolina to \$631 per month in Alaska. HOUSE COMM. ON WAYS AND MEANS, 2004 GREEN BOOK 7-36, tbl.7-32 (Pub. 108-6, 2004), *available at* <http://waysandmeans.house.gov/media/pdf/greenbook2003/Section7.pdf>.

¹⁷⁷ *Id.* at 7-91 to 7-92 & tbl.7-32.

¹⁷⁸ THE URBAN INST., THE COST OF PROTECTING VULNERABLE CHILDREN III: WHAT FACTORS AFFECT STATES' FISCAL DECISIONS?, Occasional Paper No. 61, at 18 tbl.4 (2002).

¹⁷⁹ Social Security Act, Title XIX; 42 U.S.C. §§ 1396 through 1396v.

¹⁸⁰ Pub. L. No. 89-97.

Eligibility

States are required to cover pregnant women and children under age 6 with family incomes below 133 percent of poverty,¹⁸¹ and children over age 5 and under age 19 in families below the poverty line. States have the option to also cover pregnant women and infants under 1 year of age whose family income is between 133 and 185 percent of poverty (36 states do so). States must provide Medicaid to recipients of Title IV-E foster care and adoption assistance under age 18, and have the option (under the Chafee Act) to extend Medicaid coverage to former foster care recipients aged 18, 19, or 20. States also have the option of covering certain other young people under age 21, and states often use that option to cover children in state-sponsored foster care and children who are institutionalized. States are precluded from imposing cost-sharing on services for children under 18 or services related to pregnancy.

Benefits

Medicaid includes both mandatory services (*e.g.*, hospitalization, lab and x-ray fees, family planning and pregnancy-related services, family nurse practitioners, and physicians' services), and optional services (*e.g.*, eyeglasses, prescription drugs, dental care, and case management). In addition, children under age 21 are entitled to receive preventative care through "Early and Periodic Screening, Diagnosis and Treatment" (EPSDT), including comprehensive physical exams, immunizations, lead screening, vision and dental services, and other health care to address any conditions identified through the exams. About half of the children who receive Medicaid services receive them through managed care.¹⁸²

According to the Urban Institute, Medicaid provides \$781 million in child welfare services (beyond routine medical services), such as targeted case management and rehabilitative services.¹⁸³

§ 8.6.3 State Children's Health Insurance Program (SCHIP)

In 1997, Congress established the State Children's Health Insurance Program (SCHIP)¹⁸⁴ under a new Title XXI of the Social Security Act. Unlike Medicaid, SCHIP is not an open-ended entitlement for qualifying individuals. SCHIP provides approximately \$5 billion in federal funding to states, and states

¹⁸¹ For 2003, the federal poverty threshold for a single parent with two children was \$14,824 in annual income, for two parents with two children it is \$18,660, and for a single parent with three children it was \$18,725.

¹⁸² HOUSE COMM. ON WAYS AND MEANS, 2004 GREEN BOOK, at 15-MEDICAID-33 to 15-MEDICAID-39 & tbl.15-MEDICAID-8 (Pub. 108-6, 2004), available at <http://waysandmeans.house.gov/media/pdf/greenbook2003/MEDICAID.pdf>.

¹⁸³ THE URBAN INST., THE COST OF PROTECTING VULNERABLE CHILDREN III: WHAT FACTORS AFFECT STATES' FISCAL DECISIONS?, Occasional Paper No. 61, at 18 tbl.4 (2002).

¹⁸⁴ Pub. L. No. 105-33; Social Security Act, Title XXI; 42 U.S.C. §§ 1397aa through 1397f.

may cover children under age 19 in families above Medicaid income eligibility but below a specified income level; about half of the states have established an upper income limit of 200 percent of poverty, with the rest of the states evenly split between those with higher income limits and those with lower income limits. In designing their SCHIP programs, states may expand their Medicaid program, create a new separate state insurance program, or combine the two approaches. States that choose to expand Medicaid to new eligibles under SCHIP must provide the full range of mandatory services as well as optional services specified in their state Medicaid plans. SCHIP enrollment is 5.3 million children, including 4 million in separate state programs and 1.3 million in Medicaid expansions.¹⁸⁵

§ 8.6.4 Supplemental Security Income (SSI)

Supplemental Security Income (SSI)¹⁸⁶ is a means-tested federally administered income assistance entitlement program established in 1972. In 2002, it provided \$34.6 billion for monthly cash payments¹⁸⁷ to 6.8 million qualifying needy individuals who are aged, blind, or disabled, more than 914,000 of whom were children, some of whom were in foster care.

SSI supports more than \$73 million in funding for children in out-of-home placements. States have an incentive to ensure SSI funding for eligible children in foster care, since SSI is fully federally funded—there is no required state match, as there is for IV-E foster care and Medicaid.¹⁸⁸

Eligibility

To qualify for SSI, children under 18 must have “a medically determinable physical or mental impairment which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.”¹⁸⁹

§ 8.6.5 Other Federally Sponsored Assistance

Other federally sponsored assistance may be available to help qualifying children and families, including those in the child welfare system. Some of these assistance programs are listed below. In appropriate cases, attorneys in child welfare cases should take necessary actions to ensure that relevant services and

¹⁸⁵ HOUSE COMM. ON WAYS AND MEANS, 2004 GREEN BOOK 15-SCHIP-9 & tbl.15-SCHIP-1 (Pub. 108-6, 2004), available at <http://waysandmeans.house.gov/media/pdf/greenbook2003/SCHIP.pdf>.

¹⁸⁶ Pub. L. No. 92-603; Social Security Act, Title XVI; 42 U.S.C. §§ 1381 through 1383(d).

¹⁸⁷ The monthly federal benefit rate for individuals was \$552 in 2003. HOUSE COMM. ON WAYS AND MEANS, 2004 GREEN BOOK 3-3 (Pub. 108-6, 2004), available at <http://waysandmeans.house.gov/media/pdf/greenbook2003/Section3.pdf>.

¹⁸⁸ THE URBAN INST., THE COST OF PROTECTING VULNERABLE CHILDREN III: WHAT FACTORS AFFECT STATES' FISCAL DECISIONS?, Occasional Paper No. 61, at 18 tbl.4 (2002).

¹⁸⁹ HOUSE COMM. ON WAYS AND MEANS, 2004 GREEN BOOK 3-1 to 3-70 (Pub. 108-6, 2004).

supports (for children and for their parents or other caretakers) and relevant placements for children—including those services and placements supported through the federal funding streams discussed in this chapter—are provided.

Nutrition Assistance Programs

Nutrition assistance programs include:

- Food Stamps,¹⁹⁰ which is a means-tested entitlement that enabled 8.2 million low-income households to receive over \$18 billion in nutritional support in 2002—on average, just over \$180 monthly per household.
- The Special Supplemental Nutrition Program for Women, Infants, and Children (WIC),¹⁹¹ which is a non-entitlement program that in 2002 provided \$4.5 billion in federal nutrition support—food, nutrition education, and service referrals—to about 7.5 million low-income pregnant women and children up to age 5 each month.
- Child Nutrition Programs,¹⁹² which include School Lunch (\$6.8 billion in fiscal year 2004), School Breakfast (\$1.8 billion in fiscal year 2004), Special Milk (\$14 million in fiscal year 2004), Child/Adult Care Food (\$2 billion in fiscal year 2004), and Summer Food (\$281 million in fiscal year 2004).

Section 8 Housing Assistance

Section 8 Housing Assistance¹⁹³ is a non-entitlement program providing \$19.3 billion in rental assistance so 3 million low-income eligible families can afford decent housing.

Child Care and Development Block Grant (CCDBG)

The Child Care and Development Block Grant (CCDBG),¹⁹⁴ provided \$4.8 billion in fiscal year 2004 for child care assistance to low-income working parents of nearly 3.2 million children under age 13.

Head Start

Head Start¹⁹⁵ is a non-entitlement program established in 1965, which provided \$6.8 billion in fiscal year 2004 to support quality early childhood education opportunities and comprehensive services for over 900,000 low-income children

¹⁹⁰ The Food Stamps program was established in 1977 by Pub. L. No. 88-525; 7 U.S.C. §§ 2011 through 2036.

¹⁹¹ 42 U.S.C. § 1786.

¹⁹² 42 U.S.C. §§ 1751 through 1790.

¹⁹³ 42 U.S.C. §§ 1437 through 13664.

¹⁹⁴ 42 U.S.C. § 9858.

¹⁹⁵ 42 U.S.C. §§ 9831 through 9843a.

to ensure they are ready for kindergarten and prepared to succeed in school and life.

Post-Secondary Education Loans, Grants, and Work-Study

Higher Education Act (Title IV) post-secondary education loans, grants, and work-study¹⁹⁶ provided \$14 billion in fiscal year 2004 for student financial aid, including:

- Federal “Pell Grants.”
- Federal “Ford Direct Loans.”
- Three Campus-Based Programs that include the Federal “Perkins Loan,” the Federal Supplemental Educational Opportunity Grant, and Federal Work-Study.
- Federally guaranteed loans from private lenders (federal “Stafford Loans” to students and federal “PLUS loans” to parents).

Block Grants to States and Localities

A number of federal block grants to states and localities support state and local programs that may serve abused or neglected children and their families, such as:

- Social Services Block Grants to states (SSBG):¹⁹⁷ Of the \$1.7 billion available for a wide variety of state social services expenditures, approximately \$260 million is used for child protective services, foster care services, and adoption services for more than 1.8 million children.¹⁹⁸ Additional SSBG funds serve abused and neglected children, as well (e.g., case management, counseling, home-based, independent living, prevention and intervention services), for a total of \$900 million (over half) of SSBG funding spent on child welfare services.¹⁹⁹
- Maternal and Child Health Block Grant²⁰⁰ (funded at \$730 million for fiscal year 2004).
- Substance Abuse and Mental Health Services Grants²⁰¹ (funded at \$3.2 billion in fiscal year 2004).

¹⁹⁶ 20 U.S.C. §§ 1070 through 1087-2; 42 U.S.C. §§ 2751 through 2756b.

¹⁹⁷ Social Security Act, Title XX; 42 U.S.C. §§ 1397 through 1397f.

¹⁹⁸ ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS., *SSBG 2002: HELPING STATES SERVE THE NEEDS OF AMERICA’S FAMILIES, ADULTS AND CHILDREN* (2002).

¹⁹⁹ THE URBAN INST., *THE COST OF PROTECTING VULNERABLE CHILDREN III: WHAT FACTORS AFFECT STATES’ FISCAL DECISIONS?*, Occasional Paper No. 61, at 18 tbl.4 (2002).

²⁰⁰ Social Security Act, Title V; 42 U.S.C. §§ 701 through 716.

²⁰¹ 42 U.S.C. §§ 300x-1 through 300x-9.

- Title I Education for the Disadvantaged²⁰² (funded at \$14.4 billion in fiscal year 2004).
- Workforce Investment Act,²⁰³ which provides for youth and adult employment assistance, including Job Corps (funded at \$5.1 billion in fiscal year 2004).
- McKinney-Vento Homeless Assistance Act programs in the Department of Housing and Urban Development²⁰⁴ (\$1.26 billion for HUD Homeless Assistance, including Emergency Shelter Grants, Supportive Housing Program, Single Room Occupancy Dwellings Program, Shelter Plus Care Program), as well as the Runaway and Homeless Youth Act programs in the Department of Health and Human Services²⁰⁵ (\$105 million in fiscal year 2004 for Basic Centers, Transitional Living, and Street Outreach), and Education for Homeless Children and Youth²⁰⁶ (funded at \$60 million in fiscal year 2004).
- Juvenile Justice and Delinquency Prevention programs²⁰⁷ (funded at \$349 million in fiscal year 2004).

Other Federal Laws

Other federal laws that may be relevant include:

- The federal Child Support Enforcement Program²⁰⁸ (\$4.4 billion to assist states in locating noncustodial parents and including operating the Federal Parent Locator Service, establishing paternity, and enforcing support obligations of noncustodial parents).
- A variety of federal funding streams and statutory requirements under the Violence Against Women Act of 1994 (VAWA)²⁰⁹ and the Victims of Trafficking and Violence Protection Act of 2000,²¹⁰ including a provision granting full faith and credit for domestic violence protective orders entered by state or tribal courts in compliance with the VAWA.

²⁰³ 29 U.S.C. §§ 2801 through 2945.

²⁰⁴ 42 U.S.C. § 11301.

²⁰⁵ 42 U.S.C. §§ 5701 through 5785.

²⁰⁶ 42 U.S.C. §§ 11431 through 11435.

²⁰⁷ 42 U.S.C. §§ 5601 through 5785.

²⁰⁸ Social Security Act, Title IV-D; 42 U.S.C. §§ 651 through 669b.

²⁰⁹ Pub L. No. 103-322; 18 U.S.C. § 2265.

²¹⁰ Pub. L. No. 106-386.

§ 8.7 Sally's Case: Applying Selected Federal Funding Streams and Statutory Requirements

<p>An at-risk (low-income, first-time, single) mom, during pregnancy, gets pre-natal and post-natal nurse home visits; the risk of child abuse/neglect is averted.</p> <p>Meanwhile, nearby, a teacher observes Sally, age 6, with black and blue marks on arms and swollen lip; her explanation of falling does not fit the injuries. Teacher calls hotline.</p> <p>Child protective services worker receives report of suspected abuse, investigates, and substantiates abuse.</p>	<p>Title IV-B Promoting Safe and Stable Families funding and CAPTA Community-Based Prevention support this up-front prevention (prior to any report or suspicion of abuse/neglect).</p> <p>CAPTA requirement for mandatory reporting (and good faith immunity for reporters) of suspected child abuse/neglect by teachers, etc.</p> <p>CAPTA state grants funding supports child protective services investigation of report.</p>
<p>Sally is removed from her mother's home; a petition of child abuse is filed in court, and the court appoints attorney/guardian ad litem.</p>	<p>CAPTA requirement for appointment of guardians ad litem for abused/neglected children who are the subject of court cases.</p>
<p>Sally is placed in foster care.</p>	<p>Title IV-E foster care pays for part of the costs of foster care (the state match pays for the rest). The agency also trains and licenses foster parents using IV-E funding, and conducts criminal background checks on the foster parents.</p>
<p>An initial hearing is held; attorney for Sally's mother argues that agency failed to make "reasonable efforts" to prevent Sally's placement in foster care.</p>	<p>Title IV-E foster care requirement that agency make "reasonable efforts" to prevent placement, while keeping safety of child the paramount consideration.</p>
<p>Sally's guardian ad litem investigates whether another state's court has exclusive continuing jurisdiction due to the divorce-related joint custody order entered where the family resided previously.</p>	<p>Parental Kidnapping Prevention Act determines court jurisdiction (all family members have since moved away from the state in which the joint custody order was issued; there is thus no continuing jurisdiction).</p>

<p>Sally's school performance begins to deteriorate; she cries often; the social worker refers her for therapy.</p>	<p>Medicaid covers the costs of weekly therapeutic treatment.</p>
<p>Meanwhile, the social worker's investigation determines that Sally's mother has a drug abuse problem.</p>	<p>Sally's mother receives drug abuse treatment through a program funded by the federal Substance Abuse block grant.</p>
<p>The social worker also develops contract with Sally's mother; Sally's mother promises to continue drug abuse treatment and anger management sessions.</p>	<p>Anger management sessions are supported through the Title XX Social Services Block Grant.</p>
<p>At an adjudication hearing, the court determines that Sally was abused, but that Sally may now be safely returned home, under protective supervision of agency.</p>	<p>Title IV-B Child Welfare Services supports in-home services for family.</p>
<p>Sally's mother drops out of drug treatment and anger management sessions; Sally arrives at school dirty, tired, and hungry; her mother hadn't come back after going out the day before; the agency places Sally with her grandmother.</p>	<p>Grandmother does not want to become licensed foster care provider; she gets TANF support to help with costs of caring for Sally ("kinship care").</p>
<p>Sally's grandmother is overwhelmed and thus unable to care for Sally for long; Sally's mother still hasn't completed drug treatment or anger management; Sally re-enters foster care.</p>	<p>IV-E foster care payments resume.</p>
<p>The court holds a disposition hearing; the agency's permanency goal is still to return Sally home.</p>	<p>Title XX and SAMHSA-funded services are again offered and partially completed by Sally's mother.</p>
<p>A year after Sally's placement, she remains in foster care (her mother keeps dropping out of drug treatment); the court holds a permanency planning hearing.</p>	<p>Title IV-E foster care requirement for such hearings.</p>

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<p>Sally's mother stops all visits and treatment; the agency's permanency goal is changed to adoption; TPR is filed just before Sally has been in care 15 of the last 22 months.</p>	<p>Title IV-E foster care timeframe for such TPR filing.</p>
<p>Sally is placed in a preadoptive foster care home. TPR and adoption are finalized, and Sally is happy and well-adjusted in her safe, permanent home.</p>	<p>Title IV-E adoption assistance payments are provided, since Sally's emotional challenges make her a "special needs" child for purposes of adoption subsidies.</p>